In the Supreme Court

OF THE

United States

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OCTOBER TERM, 1943

Nos. 322, 323, 324

ATTILLIO SEMERIA, FRED FATTOR, CHARLES OSTERLYE, RALPH ROW, F. B. CODY, GEORGE MCBEAN, JACK MILLS, GALE PICKARD, ADOLPH LORENZETTI and CHARLES HARDY,

Petitioners,

vs.

THEODORE ROSENBERG, GUSSIE ROSENBERG, DOROTHY AIRHART, JUNE HOROWITZ and SIDNEY ROSENBERG, individually and as copartners transacting business under the firm name of American Building Maintenance Co. (a copartnership), and AMERICAN BUILDING MAINTENANCE CO. (a copartnership),

Respondents.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS BELOW, JURISDICTION AND STATUTE.

The petitioners' statements with reference to the opinions below, the jurisdiction of this court and the statute involved are correct.

II. STATEMENT OF THE CASE.

The petitioners' statement of the case seems sufficient except in two respects:

1. The petitioners say (Petition, p. 4) that the Banks "are engaged in commerce * * *, and this was conceded by respondents in the court below (R. 1307)."

This reference to the record is to a statement of the Circuit Court of Appeals in its opinion that "appellants concede that the Banks are in commerce, but deny that appellees are engaged in commerce". The respondents did concede in the Circuit Court of Appeals that part of the Banks' business is interstate, but at the same time they contended that the bulk of their business is intrastate. For example, they said on page 45 of their opening brief in the Circuit Court:

> "In the trial court the Building Company (the respondents) contended that the Banks were not engaged in interstate commerce. In view of the decision of this circuit in National Labor Relations Board v. Bank of America, 130 F. (2d) 624, holding that part of the business of the Bank involved in that case was interstate commerce, we, of course, are not making this contention here. But assuming that a part of the

> Banks' business is interstate, still the bulk of it is intrastate; and therefore as in the Jacksonville Paper Co. case, it is necessary to determine which activities of the Bank were interstate and which intrastate commerce."

And the Circuit Court in its opinion said:

> "These banks are substantially engaged in interstate commerce, although the greater part of their banking business is intrastate in character." (R. 1306.)

2. The petitioner's statement of the case quotes the findings of the District Court, but omits one fact relating to the findings which in view of a contention made in the petition should have been stated. The petitioners in their three complaints allege that the Banks were engaged in commerce and also in producing goods for commerce. (R. 4-5; 1023-1024; 1183-1184.) The answers deny the allegation that the Banks were producing goods for commerce. (R. 39-40; 1043-1044, and 1204.) The trial court found that the Banks were engaged in commerce. (R. 181; 183-184; 1160, 1162-1163; 1271, 1274.) But it did not find that the Banks were engaged in producing goods for commerce; it made no finding at all with regard to this issue.

III. ARGUMENT.

1. NONE OF THE GROUNDS SPECIFIED IN RULE 38 FOR THE GRANTING OF CERTIORARI EXISTS IN THIS CASE.

(a) As held by the Circuit Court of Appeals and as pointed out more at length later, *McLeod v. Threlkeld,* 63 S. Ct. 1284 has settled the fundamental legal issues involved in this case.

(b) In *Johnson v. Dallas Downtown Development Co.,* 5 Cir., 132 F. (2d) 287, the defendant, which owned and operated an office building, employed the plaintiffs as elevator operators and janitors. Many of the defendant's tenants were engaged in intrastate commerce, but, to quote the opinion of the Circuit Court of Appeals, "a substantial number of them were engaged, wholly or in part, in some type of interstate business or 'in commerce' within the meaning of the Act". None of the tenants were engaged in producing goods for commerce. The court in holding that the plaintiffs were not covered stated that the Supreme Court in the *Kirschbaum* case had given the production coverage a "broad construction"; but that it believed that Congress intended that the commerce coverage should not be "stretched or strained to cover every person whose labor is of use or convenience or whose labor in some fashion contributes to the convenience of one who is engaged in commerce".

The plaintiffs then applied to this court for a writ of certiorari. In their petition they stated that the Circuit Court had construed the Act in a way "probably in conflict with" *Kirschbaum v. Walling,* 316

U. S. 517, 62 S. Ct. 116; *Overstreet v. North Shore Corporation,* 318 U. S. 125, 63 S. Ct. 494; *Walling v. Jacksonville Paper Co.,* 317 U. S. 564, 63 S. Ct. 332; that there were several other cases, including *Stoike v. First National Bank,* 290 N. Y. 195, 48 N. E. (2d) 482, "involving the identical question here at issue"; and that therefore it would be proper for this court to take jurisdiction and decide the point and thus terminate all the litigation then pending. But this court, before deciding the *McLeod* case, denied the application for the writ.

There is, of course, no difference between the case in which a janitor is cleaning and polishing in the offices of business, not a bank, engaged in interstate commerce and the case in which a janitor is doing such work in the offices of a bank. Although we understand that the denial of certiorari does not import any expression of opinion upon the merits of a case, *U. S. v. Carver,* 260 U. S. 482, 43 S. Ct. 181, still it seems plain to us that as this court found it unnecessary to issue a writ in the *Johnson* case, it surely will not, after its opinion in the *McLeod* case, in which it determined the points decisive in this case, consider it necessary to issue a writ in this case.

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2. THE McLEOD DECISION IS CONTROLLING.

The two fundamental issues involved in this litigation from its beginning are these:

First, what is the test that should be applied in determining whether an employee is engaged in com-

merce within the meaning of the Act; shall the formula be that anyone "facilitating" or "promoting" interstate commerce falls within the scope of the Act, so that the result will be in effect the same as though the Act had expressly provided that it should cover workers doing work affecting commerce; or shall the formula be more limited so that the Act will cover only those actually engaged in some phase of interstate commerce; and

Second, do the so-called production and commerce provisions of the Act cover commensurate areas; in other words, if it be held that a janitor working in an industry producing goods for commerce falls within the production coverage, does it follows that a janitor working in an industry engaged in commerce falls within the commerce coverage.

The *McLeod* case has settled both points against the contentions made by the petitioners throughout this litigation.

In the *Kirschbaum* case, the court said (316 U. S. 522, 62 S. Ct. 1119-1120):

> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce'. H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158-9266-67."

In the *McLeod* case, this court said that "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority"; and that the legislative history of the Act discussed in the *Kirschbaum* case showed that Congress' selection of the smaller group was *"deliberate* and *purposeful"*.

Parenthetically, we might say that the petitioners are asking that this court give the Act a construction that would be in defiance of this "deliberate and purposeful" intent of Congress.

This court in the *McLeod* case then stated that the test of the Federal Employers Liability Act was applicable, but that it would follow the cases holding that "each employment that indirectly assisted the functioning of" transportation "was not a part" of it. And it then laid down the test applicable under the Fair Labor Standards Act as follows (63 S. Ct. 1251-52):

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are *actually in* or *so closely related to the movement*[1] of the commerce as to a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase 'production of goods for commerce'."

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[1]All emphasis by italics are ours unless otherwise indicated.

It thus appears that the court in the *McLeod* case made it plain that it would abide by Congress' intent that the Act should not cover persons engaged in work affecting commerce; and also that it held that the commerce coverage of the Act was not as extensive as its production coverages. In other words, this court in the *McLeod* case ruled against both propositions which have constituted the basis of petitioners' claims since the commencement of this litigation.

It is clear that the most the petitioners can claim is that their work affected commerce; and it is equally clear that under the test laid down in the *McLeod* case the petitioners are not covered. As held by the New York Court of Appeals in the *Stoike* case, a janitor's work in a bank, "although it may contribute remotely to the comfort and convenience of those whose services are vital to its business, is not a step in the process of banking". And the Court of Appeals then said:

> "Indeed, as we consider the activities of those who conduct the vital functions by which the business of a commercial bank, such as the defendant, is accomplished, *the essential characteristics of that portion of its banking service which is interstate commerce are lost* before we reach the position held by the plaintiff."

In general, the interstate activities of the Banks in the cases at bar consisted in sending and receiving negotiable paper for collection, in transmitting and receiving credits, and in buying and selling securities. The plaintiffs are certainly not "actually in or so closely related to the movement" of this interstate

commerce on the part of the Banks "as to be a part of it." On the contrary, they play no part whatever in these transactions and are far removed from them. To paraphrase the *Stoike* case, the interstate commerce character of that portion of the Bank's business having this character is entirely lost before the positions held by the plaintiffs are reached. And as held in the *Stoike* and *Johnson* cases, the most that can be said for the plaintiffs is that the work of certain of them contributed to the comfort and convenience of those engaged in the interstate activities of the Bank, but this is certainly not enough.

Petitioners rely on Mr. Justice Denman's dissent in the case at bar. Mr. Justice Denman stated that the work of janitors in the case at bar in removing discarded papers and cleaning ink wells was similar to the work of a railroad gang cleaning passenger coaches used to carry persons interstate; that their work was "a direct aid" in interstate commerce; and that a bank which did not have janitors to keep dirt and dust from accumulating "would cease to function".

It is true that the officers and employees could not work in a building littered with dust and dirt; but neither could they work in a building that was not properly heated and ventilated, that did not have running water and its plumbing in repair, that did not have its broken windows mended, and its floors and other parts kept in repair. The work of the janitors is no more an aid to the interstate commerce transac-

tions of the Banks than the work of the plumbers, glaziers and carpenters who keep its building in repair.

Mr. Justice Denman's comparison between cleaning an ink well and cleaning a railroad car is not at all convincing. The Bank officer who dips his pen into an ink well may use the ink to sign a draft or a letter of credit used to establish a credit out of the state; but he may use it to sign a letter to his friend or relative, or a letter relating to a purely intrastate transaction, or for a variety of other reasons. But the railroad car which is cleaned by employees of the railroad company is an instrumentality of commerce and can only be used for the transportation of freight and passengers. Surely an inkwell cannot be regarded an instrumentality of commerce like a passenger coach. And if the employees involved in the *Shanks, Bolle, Industrial Commission* and *Bezue*[2] cases, which were approved by this court in the *McLeod* case, were not engaged in commerce, then janitors cleaning inkwells and removing discarded papers in bank offices cannot be so regarded.

The lower courts in the eighteen cases cited in the note have been practically unanimous in holding that building service employees working in buildings occupied at least in part by persons engaged in interstate

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[2]*Shanks v. Del. Lack. & West. R. R.*, 239 U. S. 556, 558, 36 S. Ct. 188, 189; *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, 78, 52 S. Ct. 59, 61; *Chicago & E. I. R. Co. v. Commission*, 284 U. S. 296, 52 S. Ct. 151; *New York N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, 419, 52 S. Ct. 205, 206.

commerce are not covered by the Act.[3] Certainly this unanimity of judicial opinion should be given great weight.

There can be no doubt that the Circuit Court of Appeals in the case at bar was correct in holding that the *McLeod* case is controlling.

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3. THE ISSUE WHETHER THE BANKS WERE ENGAGED IN THE PRODUCTION OF GOODS WAS NOT BEFORE THE CIRCUIT COURT OF APPEALS, NOR IS IT BEFORE THIS COURT; BUT IN ANY EVENT THE BANKS WERE NOT ENGAGED IN THIS ACTIVITY.

The petitioners' statement of what the evidence showed respecting this point is inaccurate. They say that the Banks "actually 'produced' or issued various types of commercial paper such as drafts, bills of exchange, letters of credit * * *". (Petition, p. 9.)

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[3]*Cochran v. Florida Nat'l Bldg. Corp.*, 5 Cir., 134 F. (2d) 615; *Tate v. Empire Bldg. Corp.*, 6 Cir., 137 F. (2d) ....., 6 W. H. R. 571; *Johnson v. Dallas Downtown Development Co.*, 5 Cir., 132 F. (2d) 287; *Burton v. Zimmerman*, 4 Cir., 131 F. (2d) 377; *Johnson v. Filstow, Inc.*, D. C. Fla., 43 F. S. 930; *Lofther v. First Nat'l Bank of Chicago*, D. C. Ill., 48 F. S. 692; *Johnson v. Masonic Bldg. Co.*, D. C. Ga., 6 Labor Cases 61,301; *Hinkler v. Eighty-Three Maiden Lane Corp.*, D. C. N. Y., 50 F. S. 263; *Convey v. Omaha Nat'l Bank*, D. C. Neb., 7 Labor Cases 64,697; *Callus v. 10 East 40th Street Bldg., Inc.*, D. C. N. Y., 7 Labor Cases 64,806; *Wideman v. Blanchard & Calhoun Realty Co.*, D. C. Ga., 50 F. S. 626; *Bartholome v. Baltimore Fire Patrol*, D. C. Md., 48 F. S. 98; *Noonan v. Fruco Const. Co.*, D. C. Mo., 50 F. S. 432; *Stoike v. First Nat'l Bank*, 290 N. Y. 195, 48 N. E. (2d) 482; *Matter of Liquidation of New York Title & Mortgage Co.*, N. Y. Sup., 39 N. Y. S. (2d) 893; *Patterson v. Memphis Cotton Exchange Realty Co.*, Tenn. Ch., 6 W. H. R. 308; *Johnson v. Hamilton Nat'l Bank*, Tenn Ch., 6 Labor Cases 63,791; *Johnson v. Great Nat'l Life Ins. Co.*, Tex. Civ. App., 166 S. W. (2d) 935.

Now what the record really shows respecting this matter is that the Banks transmit funds to banks outside the state and that banks outside the state transmit funds to them (R. 241-242), and that this is done by transfers of credit, either by the use of drafts or by telegraphic instructions (R. 241-245; 263-264; 363-364.) At times a draft drawn by one of the Banks on an out of state bank is not presented to the drawee bank for payment; but passes from hand to hand and is ultimately paid by the bank issuing it. (R. 263-264.) And the Banks in connection with the importation of goods issue letters of credit for the purpose of establishing credits in foreign banks. These letters are in the form of a letter addressed to the foreign bank requesting it to establish a credit in favor of the foreign shipper. (R. 267-269; 354-357; and 359; 387-388.)[4]

These are the facts shown by the record, not the petitioners' conclusions with respect to the facts.

The petitioners also say that the banks "produced" "new issues of stock". (Petition, p. 9.) The record relating to this point is that the trust department of the Bank acts as the transfer agent of corporations (R. 518-519); and that when it acts in this capacity it is as the name implies the agent of the corporation for the keeping of its stock books and the transfer of its shares. (R. 519-520.)

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[4]The officers of the American Trust Company testified at length with regard to the business of that Bank, particularly the business involving relations with persons outside the state; and it was stipulated that the activities of the other two Banks were the same (R. 638-644, 646, 700-704, 1234-1235).

The petitioners also state that the banks "supply information on request of investors". (Petition, p. 9.) But what the record shows is that on occasions the Banks give investment advice to their customers; that they are not in the business of giving this advice; and are not investment counsellors and are not paid for investment advice; but if a customer wants information with regard to the financial standing of some person or the value of a security, the Banks if in a position to do so will answer the inquiry. (R. 508-510.)

There is no person engaged in business who does not issue checks and who does not render information in some way or other to those with whom he is dealing. Therefore, if the petitioners' suggestion were correct, practically everyone in the business world would be producing goods within the meaning of the Act. This could not have been the intent of Congress.

But even if the Banks were producing goods within the meaning of the Act, the petitioners are not in a position to raise the point. It is true that they did argue the point in the Circuit Court of Appeals and that that court in the course of its opinion stated that the petitioners were "not in any sense engaged in production." But as we have already pointed out, the pleadings in the cases raised the issue whether the petitioners were engaged in production, but the trial court did not make any finding with respect to this issue. Neither the Circuit Court of Appeals nor this court may make such a finding. (Rule 52 FRCP; the annotation following this rule in 28 USCA 723c, p. 677; *Matton Oil Transfer Corporation v. The Dy-*

namic, 2 Cir., 123 F. (2d) 999; *Selby Oil & Gas Co. v. Railroad Commission,* 5 Cir., 128 F. (2d) 334; and *Mayo v. Lakeland Highlands Canning Co.,* 309 U.S. 310, 316, 60 S.Ct. 517.)

IV. CONCLUSION.

For these reasons we respectfully submit that the petition be denied.

Dated, San Francisco, California,
September 27, 1943.

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